LOS ANGELES BAR BULLETIN

In This Issue

Vol. 30 JUNE, 1955 No. 9

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association, 241 East Fourth Street, Los Angeles 13, California. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.80 a Year; 15c a Copy.

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The President's Page

By Kenneth N. Chantry

"VINDICATION INTENDED"

Kenneth N. Chantry

My calm and tranquil existence has frequently been ruffled by the public opinion polls of Dr. George Gallop, Elmo Roper and Reginald Herber —Smith,* which disclose that lawyers are held in shabby and abject esteem by the general public. School teachers, clergymen, doctors, engineers and merchants appear to rank higher in public respect.

Although public opinion may inevitably condemn us to lowly rank among the trades and professions, lawyers may take some minor consolation by recognizing that the basic and fundamental conditions upon which their profession exists may of themselves engender such mean evaluation in the public mind.

The work of the lawyer lies among the troubles, grievances

*"What Do Laymen Think of Lawyers," by Albert P. Blaustein, A.B.A.J. Vol. 38, P. 39 (January 1952).

and disasters of men and women like ourselves. Practically all incidents in life sooner or later find their way to a lawyer's office or a court of law.

Lawsuits usually involve two or more parties tinged in anger, with divergent opinions, and contending for opposite ends. If one side wins, one side loses. Sometimes everyone loses.

The restriction of freedom, the payment of money, or the surrender of property or rights—real or imaginary—by either party, does not inculcate seeds of kindness, admiration or respect for lawyers, or the due process of law. The administration of our talents in such matters, irrespective of the skill and adroitness exercised, should not be expected to produce the same public enthusiasm, regard or respect that a doctor obtains by administering to the sick, or an engineer receives by constructing an elegant structure, or a member of the clergy attains by preaching the gospel.

Despite the trouble-ridden contest in which we perform our day-to-day duties, our profession is deeply and firmly grounded in history, tradition, great men and great documents. Among the causes which have made Americans free men, self-governed and self-controlled, the law has played a leading part. Lawyers outnumber all other occupations and professions in Congress and State Legislatures, and are the leading exponents of our system of government and the way of life which depends upon it.

It isn't my purpose to place a nimbus of impeccability around my profession nor to deny that there are rascally lawyers — a few in history — some in fiction — and more in drama. But it is my design to suggest that where complaints against lawyers are unfounded, it is our task to sell the true roll of the lawyer to the public. "Fortunately, Public Relations Committees exist to do the job. Unfortunately, many lawyers have yet to be convinced that the job needs doing."

New Tax and Retirement Benefits for Group Professional Practice

By Maurice H. Dolman*

Lawyers, doctors, accountants, dentists, architects, and other professional practitioners engaged in private practice—but associated in that practice with others of their own profession—can now secure a number of advantages in planning their retirement and insurance programs which have hitherto been unavailable. A decision recently announced by the Court of Appeals for the Ninth Circuit makes possible the inclusion of such professional practitioners under the Federal Social Security Act (if they are not covered under the recent revisions) and the use of "before tax" dollars in the purchase of insured pension or profit-sharing plans.

REVIEW OF THE TEST CASE

The test case, involving eight partners in a medical partnership called the Western Montana Clinic, arose in 1952. [*Kintner v. United States,* D. C. Mont., 107 F. Supp. 976, aff'd, 9 Cir., 216 F. 2d 418.]

Many years prior to June 30, 1948, eight doctors had organized a medical partnership under the name of "Western Montana Clinic," located in Missoula, Montana. As the clinic grew in size, its management became cumbersome because of the necessity for the consent of the partners to the various details of the management and business of the clinic. Similarly, the continuity of the partnership organization was constantly threatened by the possibility of death or resignation of old members or the addition of new ones.

On June 30, 1948, the partners organized the Western Montana Clinic, an association, by the adoption and execution of Articles of Association. The members of the Association were the same persons who had been members of the predecessor partnership. The Association acquired all of the assets and undertook all of the liabilities of the predecessor partnership and then the partnership was dissolved. Each of the former partners was given a note, payable by the Association, for the value of the partnership interest.

The Association, in its own name, rented space and hired doctors, nurses, technicians, a business manager, and other office per-

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sonnel; purchased supplies and equipment necessary for the practice of medicine; collected the fees charged by the doctors and other employees of the clinic for medical and surgical services rendered; paid all bills incurred, including salaries and bonuses to employees; paid social security taxes and withholding taxes on all employees, including the member doctors; *and paid Federal Corporation Income Taxes and State Corporation License Taxes.*

The major affairs of the Clinic were managed by an executive committee composed of less than the whole clinic membership. Changes in membership have occurred without disrupting the continuity of the Association, in accordance with the provision of its Articles of Association (Article XXIV) that ". . . neither the death, insanity, bankruptcy, retirement, resignation or expulsion of a member shall cause a dissolution of the Association. . . ." The Association was to terminate on the death of the last of the original eight members.

The capital structure in the Association is unique in that none of the members of the Clinic, either senior or junior, have any presently realizable ownership in the property of the Association. The original members' ownership is contingent, *in character,* upon dissolution of the Association by a ¾ vote of all senior members and upon continued membership until the time of such dissolution. The ownership of members admitted since the initial organization of the Association is contingent upon a dissolution of the Association by a ¾ vote of all senior members, or the death of all the original members. *In quantity,* the ownership of any member is contingent upon the amount of property available for distribution and the number of members in the Association at the time of dissolution.

No person is eligible for membership who is not a physician or surgeon licensed to practice medicine in the State of Montana. Compensation of the doctors, as well as all employees, is fixed by the executive committee and bears no explicit relationship to the number of patients who consult the doctor or the amount of the fees paid. The control exercised by the Association over the member doctors is no different from the control exercised over employee doctors who are not members of the Association, and consists primarily of general supervision of the quality of work.

At the time of its organization, the Association adopted a pen-

sion and retirement plan by which all contributions are made by the Association. The plan is non-contributory from the employees, and was devised to conform with the provisions of Section 165 of the 1939 Code. It was so held by the courts, desipte the fact that it was not submitted for prior approval of the Treasury Department. All employees of the Association who have had three years of continuous service with the Association, including service with the predecessor partnership, and who have attained the age of 30 years, are eligible to participate. Of the 38 employees of the Association 24 were ineligible to participate because they worked less than 3 years; 3 were ineligible because of the age requirement. This left 11 eligible employees, of whom 8 were the original senior members.

In 1948 the Association contributed approximately $1,000 to the pension trust for the benefit of its president, Dr. Arthur Kintner, and also set up approximately $1,140 as a reserve fund, which would have been properly taxable as income to Dr. Kintner had the Clinic been a partnership and Kintner a partner therein.

The Commissioner taxed these items to Kintner, who paid the tax under protest, and then sued for refund in the District Court. The court held as follows:

1. The Western Montana Clinic is not a service organization for a group of doctors each of whom is separately practicing medicine, contrary to the argument advanced by the Commissioner.

2. The Western Montana Clinic is an association taxable as a corporation. Recognizing that it does not bear an exact resemblance to either a corporation or a partnership, the court held that it was more nearly a corporation, applying these standards, first announced in *Morrissey v. Commissioner,* 296 U.S. 344:

a. Is the property held in the name of the Association?
b. Does the Association have centralized management?
c. Is there a continuity of the association in the event of death or withdrawal of a member?
d. Is there a transferability of the beneficial interests?
e. Is there a limitation of personal liability?

The court decided that the Western Montana Clinic Association measured affirmatively on the first three determinants, in part on the fourth, and negatively on the fifth.

The Ninth Circuit affirmed. [*United States v. Kintner,* 9 Cir., 216 F. 2d 418.] In a decision written by Judge Yankwich, the Court in some respects broadened the decision of the District Court. The

opinion points to "a decision of the Court of Appeals for the Seventh Circuit holding that a clinic organized for the practice of medicine was an 'association' and taxable as such despite the fact that the state in which it was organized (Illinois) did not permit a corporation to practice medicine: *Pelton v. Commissioner,* 7 Cir., 1936, 82 Fed. 2d 473. There the Commissioner was making contentions contrary to those which he is making here." [216 F. 2d at 421-422.]

As to the fifth criterion set forth in the *Morrissey* case, the decision declares: "Although the Articles of Association disclaim liability to others for the negligence or lack of skill of the doctors, the Association which contracts with the patients and receives his fees would be responsible direct to the patient, even assuming that under the law of joint tort-feasors the doctors also might be held liable." [216 F. 2d at 424.] It is interesting to note that the Ninth

Circuit, in affirming the decision, took cognizance of the fact that a corporation could not practice medicine in Montana and that the Association was considered a partnership for state law purposes. It reasoned, however, that an association can be a partnership for state purposes and a corporation for federal tax purposes.

Note should also be taken of the provision in the Kintner case where the pension plan provided for 3 years employment before becoming a participant in the plan. The member doctors were given credit for the time they were partners in the predecessor partnership. The commissioner argued that this was discrimination since they were not at that time employees. The court held that this provision prevented discrimination rather than causing discrimination since the employees of the prior partnership were given credit for the period of employment thereunder. The court declared: "A working partner is employed about the business of the partnership. . . . By requiring new employees to have a minimum of three years service, the object was to achieve equality. And equality is equity. Had doctors who had worked for the partnership not been given the benefit of their prior service, there would be discrimination against them." [216 F. 2d at 427.]

Although the Commissioner has not entered his acquiescence, the government has not sought certiorari.

TAX SIGNIFICANCE OF KINTNER DECISION

A partner whose share of partnership profits is $25,000 per year could receive a salary of $21,000 per year, have $3,150 per year contributed to a pension or profit sharing plan for his benefit, and have $850 per year retained in a reserve fund of the association. At the end of 25 years the following benefits would have accrued to him (assuming unchanged tax rates).

1. The tax reduction on reporting income of $21,000 instead of $25,000 at 38% rate is $1,520 per year. So the cash available for personal use is reduced $2,480 per year ($4,000—$1,520). In 25 years this is a total reduction of $87,594 (using a 4% interest table and taxing interest earnings at 38%).

2. In the same 25 year period a contribution of $3,150 per year can accumulate (with tax free earnings) to a profit sharing fund of $131,185.

3. The salary of $21,000 per year and the contribution to the pension plan are deductible by the Association. The retention of

reserve funds is taxed at a 30% corporate rate. So 70% of $850, or $595 per year will accumulate and increase the value of the member's interest in the association. This increase will amount to $14,875 in 25 years. Assuming that the association will use this reserve fund profitably (acquire building and equipment), the reserve fund would further accumulate to $24,780 at the end of the 25 year period.

If on retirement the member was to receive the amount of his profit sharing fund and the book value of his reserve account, he would have accumulated $29,380 more by participation in the association than he would as a partner. This is calculated as follows:

Profit sharing fund accumulated	$131,185
Reserve fund accumulated	24,780
Total	$155,965
Less: Capital gain tax on retirement (withdrawn in lump sum)	38,991
Net Available	116,974
Less: Net reduction in accumulation of estate because of salary of $21,000 per year instead of $25,000 partnership income	87,594
NET INCREASE IN ESTATE	$ 29,380

In order to avoid a surtax on the unreasonable accumulation of reserve funds, you could stop adding to the fund when it reaches $60,000 and instead increase the salary or add some additional fringe benefits for members.

4. Under Section 2039 (C) of the 1954 Code, the value of annuity or other payments made to an employee's beneficiary (other than his executor) is generally excluded from his gross estate if they are made pursuant to a qualified pension or profit sharing plan (where employee has made no contributions). These payments may be considerable—($131,185 in our example).

FACTORS OTHER THAN TAXES

1. A permit to issue its membership certificates may be required of the Association by the Division of Corporations, in some states. This, however, would serve only to strengthen the tax position.

2. Practicing medicine in an association setting may conceivably

cause some difficulty with state officials. However, if this should occur, there is remedy in some states. In California, if in form the organization is not a corporation, if membership is open only to doctors licensed to practice medicine in California, and if the members have the individual liability of partners, it would appear that such an association would be legal. Section 2393 of the California Business and Professions Code permits doctors to practice as partners or in a medical group, so long as the name includes the surname of one or more members of the group, followed by the words "Medical Group." Caution and careful examination of the law should be exercised in determining the applicability of these principles to other professions.

3. To secure the benefits which accrued to the members of the group in the Western Montana Clinic Association, it is necessary to use this form of organization, rather than using a professional partnership with an election to be taxed as corporation, under Section 1361 of the 1954 Code. The code circumscribes this privilege by making it unavailable where capital is not a material income-producing factor. Further, under Section 1361, even if this election were possible, partners cannot be held to be employees for purposes of pension trusts and profit sharing plans, under the new Code.

APPLICABILITY TO OTHER PROFESSIONS

It would seem that the partnership association form of practicing a profession would also be applicable to lawyers, CPA's, and architects. The following considerations should be kept in mind:

1. The organization should be characterized as a partnership association.

2. The investment of each member could be represented by an investment certificate. It would be possible to have different grades of membership for senior and junior members.

3. Each member should have one vote.

4. Death, insolvency, incapacity, or divorce of one or more certificate holders, or the transfer of a certificate should not terminate the association.

5. The liability of certificate holders should be that of partners. However, the association should carry negligence insurance on each member.

6. Management of the association should be in the hands of an executive committee, consisting of less than all the members of the association, so that they will act in a representative capacity.

7. The executive committee should determine the compensation of the members as well as control in a general way the manner in which they perform their duties.

8. The association should bill the clients and collect fees.

9. The facilities used in the practice should be contiguous.

10. Membership certificates should be transferable only to persons who are licensed to practice the profession and who are acceptable to the association; and a buy-and-sell agreement, probably insurance funded, should implement this agreement.

11. Tax savings can be effectuated where the estate of a deceased stockholder qualifies under the 35% net, 50% gross requirements of Section 303 of the 1954 Internal Revenue Code.

12. The Association should own and pay for insurance indemnifying the certificate holder during periods of incapacity because of sickness or accident. Income so derived is not taxable to the indemnified individual up to $100 weekly except for the first week of illness.

13. The association could pay a $5,000 death benefit to the beneficiaries of a deceased member, tax free to the beneficiaries and a business expense to the association (usually provided through insurance).

14. The association can use "before-tax" dollars for retirement income and insurance for its employees and members, through a pension plan, or a combined pension and profit sharing plan.

15. Self-employed professionals who are not currently covered under Social Security can thus become eligible in their new employee capacity.

SUMMARY

There is, therefore, a new tax avenue opened up for groups of professional practitioners who change their legal form of organization so as to conform to the criteria established in the *Kintner* case. Briefly, the following objectives can presumably be accomplished through a judicious application to the principles affirmed:

1. Establishment of a retirement fund with a currently tax-free dollar which receives advantageous treatment when it is constructively received.

2. Inclusion under Federal Social Security.

3. The greater facility for the sale of one's practice ("value of the certificate of the Association") at a fair price.

4. Purchase of insurance (life, medical reimbursement, and income protection against sickness and accident) with tax advantages.

5. Creation of a legal entity which may hold and manage property, without the creation of a separate corporation for this purpose.

These are some of the very real and important advantages for those professionals who can qualify; it must be emphasized, however, that such individuals should not rush into the formation of associations unless they are willing to work in team harness. Further, technical considerations which have not been entered into in the compass of this brief article will require expert attention.

The Sherman Anti-Trust Law In Review

By George B. Haddock*

Sixty-five years ago, the Sherman Anti-Trust Law was enacted, on July 2, 1890. The ensuing decade became known as "the gay Nineties." I do not contend that there was any causal relationship between these two facts, although I do believe there has been a direct relationship between our subsequent development into the greatest of all industrial nations and the adoption of the basic principle that our economic life and development should be determined by the forces of competition, rather than by edict of the State or industry.

This law, which was as novel and bold in its way as was the Constitution in 1789, reflected the instinctive aversion of Americans to being told how to run their personal affairs, either by government or by private individuals in positions of power.

In brief and sweeping language, the Sherman Act made unlawful: (1) Combinations, conspiracies, and contracts in restraint of trade and commerce among the several States and with foreign nations; and (2) conspiracies to monoplize, attempts to monopolize, and monopolization of any part of such trade and commerce.

In its broad and general terminology is found the source of its strength and vigor. Because it was essentially an announcement of principle and policy, and was not limited in its application to circumstances as they existed in 1890, the Act has been flexible and capable of application to changing economic and industrial conditions. However, as no definitions were contained in the Act, its enforcement and application have depended upon the interpretation given to it by courts in specific fact situations.

The Act gave rise to numerous questions, some of which have not yet been fully answered. Among them were: What was the meaning of "trade and commerce among the several States"? What constituted a "restraint" upon that trade and commerce? What kinds of contracts restrain trade? What was meant by the words "any part" of interstate trade and commerce? What was the meaning of "monopolize" and "attempt to monopolize"?

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The statements and opinions herein are those of the writer and do not necessarily reflect the views or opinions of the United States Department of Justice.

Over the years, a kind of common law has grown up around the Sherman Act, composed of court decisions, and I will mention at least a few of the significant decisions which have provided answers to some questions, partial answers to others, and have raised still others.

The Sherman Act is a criminal statute which provides that a violation constitutes a misdemeanor punishable by fine and imprisonment or both. Unlike most criminal laws, however, it contains in section 4 a provision that the district courts of the United States are vested with jurisdiction to prevent and restrain violations, in civil actions instituted by United States Attorneys under direction of the Attorney General.

Since 1890, the Department of Justice has filed nearly 1,300 cases. Almost exactly one-half have been criminal cases, and the remaining civil. In general, the civil actions probably have been more significant and far-reaching, both as to the subject matter and their impact on our economy, although there have been some notable exceptions, such as the *Socony-Vacuum*[1] and the *American Tobacco*[2] cases.

As a matter of personal opinion, I think it probable that there would have been relatively fewer criminal actions were it not for the fact that the only compulsory process available to the Department for the investigation of alleged violations of the Sherman Act prior to the filing of action is through grand jury subpoena, which has tended to throw to the criminal side of the docket a number of cases which might more logically have been civil in nature. There have been periods in which criminal prosecutions have been brought involving the application of new theories of law, or the extension of established principles to new types of factual situations. Recently, however, the practice has been to restrict criminal proceedings to those cases in which the activities are of a nature clearly condemned in past court decisions.

There is considerably greater certainty and less conflict and confusion in decisions relating to conspiracies to restrain trade in violation of section 1 than in decisions relating primarily to charges of monopolization under section 2 of the Act. One of the reasons

[1] *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).
[2] *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

for this situation undoubtedly is because many more antitrust cases have been brought under section 1. Another is because the factual situations involved in monopoly cases are likely to be more complex and broader in scope than those in restraint of trade cases, and therefore not as easily classified into different recognized patterns. Another way of saying this is that although certain standards have been set forth for testing monopoly, each monopoly case tends to be *sui generis*, whereas it has been possible for the courts to be much more specific in standards involving conspiracies to restrain trade.

At the beginning of Sherman Act enforcement, the Government was thrown for such a loss that for many years it abandoned all effort to enforce section 2 of the Sherman Act. In 1895, the Supreme Court held that manufacturing was intrastate in nature, and that monopolization thereof could not be reached under the Sherman Act.[3] The effect of this decision was so demoralizing that the Attorney General reported to President Cleveland that enforcement of the Sherman Act against industrialists was impossible.

It was not until ten years later that the paralyzing effect of the *Knight* decision was in large part dissipated by the decision in the first *Swift*[4] case, in which Mr. Justice Holmes said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." It is probable that this indication of a changed attitude on the part of the Supreme Court was in large part responsible for the filing of three very important monopoly cases in 1906 and 1907—the *Standard Oil*,[5] *American Tobacco*,[6] and *Reading Railroad*[7] cases. In all three, the Supreme Court held that monopolization of production, as well as distribution of the products, was within the reach of the Sherman Act.

As early as 1899, the Supreme Court had held that the Sherman Act was broad enough to extend to conspiratorial activities which "directly affect" interstate commerce, and that when an agreement directly restrains not only the purchase, sale, and exchange of a commodity, but also its manufacture, the fact that its manufacture, standing alone, might be local in nature, did not exempt the scheme

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[3] *United States v. E. C. Knight*, 156 U. S. 1 (1895).
[4] *Swift & Co. v. United States*, 196 U. S. 375 (1905).
[5] *Standard Oil Co. v. United States*, 221 U. S. 1 (1911).
[6] *United States v. American Tobacco Co.*, 221 U. S. 106 (1911).
[7] *United States v. Reading Co.* 226 U. S. 324 (1912).

from the Sherman Act.[8] This concept was expanded and elucidated in later cases holding that restraints imposed *in advance* of interstate movement, as well as restraints imposed *after* the interstate movement had terminated, may directly and substantially affect the interstate commerce, and when this is true, the Sherman Act is applicable.[9] In so holding, the Court stated:

> "The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, (and) the effects of the former two upon the latter . . . no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or the statute."[10]

The often-heard complaint, that court decisions have completely erased any distinction between interstate and intrastate commerce as far as the Sherman Act is concerned, is not truly accurate. Local or intrastate activities are still beyond the reach of the Sherman Act unless it is established that they have a direct and substantial effect upon interstate commerce, and the facts in each case must be examined to determine whether or not there is such an effect. For those interested in the practical application of these principles, I would suggest a study of the decision of the Ninth Circuit Court of Appeals last year in the *Las Vegas Merchant Plumbers*[11] case. In that case, District Judge Carter analyzes a situation in which there was a very clear conspiracy in restraint of trade at a local level, in determining whether interstate trade and commerce had been directly and substantially affected.

I would not have you believe that court decisions have removed all uncertainty as to what may or may not be considered to be interstate commerce, or to sufficiently affect interstate commerce as to fall within the scope of the Sherman Act. In the *Federal Baseball*[12] case, the Supreme Court in 1922 held that the business of providing professional baseball exhibitions was local in nature and not trade and commerce within the meaning of the Sherman Act, and that since the exhibitions were local, the fact that players and equipment

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[8] *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211 (1899).
[9] *Eastern States etc. Assn. v. United States*, 243 U. S. 600 (1914); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219 (1948).
[10] *Mandeville Island Farms v. American Crystal Sugar Co., supra*, note 9.
[11] *Las Vegas Merchant Plumbers Assn. v. United States*, 9 Cir., 210 F. 2d 732 (1954).
[12] *Federal Baseball Club v. National League*, 259 U. S. 200 (1922).

were transported across State lines was not controlling. This decision was reaffirmed in the *Toolson*[13] case in 1953. The Court did not appear to be unduly happy over this decision, as it expressly stated that it was not re-examining the underlying issues; that the business had been left for thirty years to develop on the understanding that it was not subject to antitrust legislation; and that Congress had not seen fit to overrule the 1922 decision by affirmative legislation bringing baseball under the antitrust laws.

In January of this year, however, the Supreme Court held that producing, booking, and presenting theatrical attractions on a multi-state basis, and promotion of professional championship boxing contests on a multi-state basis, were trade and commerce within the reach of the Sherman Act.[14] The Court held that the *Toolson* decision concerning baseball was a "narrow application of the rule of *stare decisis*" based on the "unique combination of circumstances" involved in baseball, and that this decision did not mean that all other businesses based on the performance of local exhibitions were also exempted from the antitrust laws.

There is uniformity in court decisions that the amount of interstate commerce which is affected is unimportant—that it is the character of the restraint, and not the amount of commerce involved, which is the test.[15]

Interstate commerce being involved or affected, what kinds of restraints thereon are prohibited? In the *Standard Oil* case[16] the Supreme Court held that the Act did not condemn all conspiracies which restrain commerce, but was intended only to reach those which "unreasonably" restrain trade. This case announced the famous "rule of reason," by which the Court sought to establish a necessary method of construing and applying the statute. I suppose the "rule of reason" has been the subject of more controversy and difference of opinion than any other single aspect of antitrust law interpretation. This situation, in my opinion, is not so much a result of the declaration that "unreasonable" restraints were

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[13] *Toolson v. New York Yankees*, 346 U. S. 356 (1953).
[14] *United States v. Shubert*, 75 S. Ct. 277 (1955); *United States v. International Boxing Club*, 75 S. Ct. 259 (1955).
[15] *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947); *Apex Hosiery v. Leader*, 310 U. S. 469 (1940).
[16] See note 5, *supra*.

the only ones condemned, as it is the fact that the Court didn't make very clear just what were "unreasonable" as distinguished from "reasonable" restraints.

A great many people have interpreted this decision as meaning that if it was reasonable for the defendants in an antitrust case to do what they did—if their acts were those which might have been done by reasonable men under the circumstances—then they committed no wrong. This became a very popular defense against antitrust actions which persisted for many years, and, in fact, still crops up from time to time, though it is without merit.

In the first antitrust case which I prosecuted, more years ago than I like to dwell upon, the district judge directed a verdict of "not guilty" in a price fixing case, on the ground that it appeared to him quite reasonable for the defendants to seek to eliminate price competition and thus enhance profits, and that their conspiracy therefore was not an unreasonable one. I might say that I fervently wished at that time that the case had been civil, rather than criminal, in order that an appeal might be taken.

In the *American Tobacco* decision[17] immediately following the first announcement of the rule of reason in the *Standard Oil* case, the Court made some statements which I have found helpful in trying to understand what the rule of reason was intended to include and exclude.

In interpreting the rule of reason, the Court said that the Sherman Act was intended to reach:

> ". . . acts or contracts or agreements or combinations which operated to the prejudice of the public by unduly restricting competition or unduly obstructing the due course of trade, or which, because of *their inherent nature or effect,* or because of the evident purpose of the acts, etc., injuriously restrain trade. . . ."
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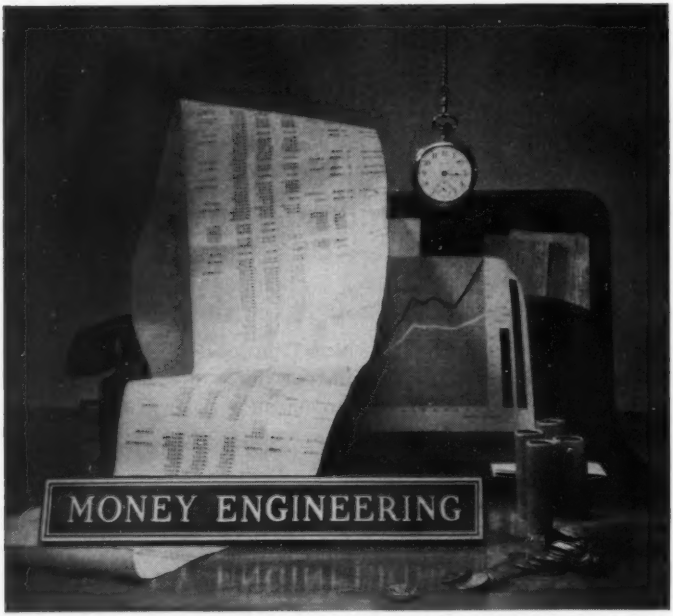
> ". . . It was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not im-

[17]See note 6, *supra.*



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possible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect."

Over a period of years, it became recognized that the character of the restraint in many instances would determine its reasonableness or unreasonableness, without need for the court to explore the uncertain area of purpose, motive, and intent. In these cases the courts held that certain types of restraints are inherently unreasonable, and constitute *per se* violations of the Act.

The *per se* doctrine has been attacked as constituting some form of revision or weakening of the "rule of reason." I don't think it does. Several years prior to the *Standard Oil* decision, the Supreme Court had held, in the *Addyston Pipe* case, that a conspiracy to fix prices was inherently an unreasonable restraint, and that it would not be justified by a contention that it was reasonable to enter into the agreement in the light of surrounding circumstances, or that the prices fixed thereby were reasonable. This decision was not overruled in the *Standard Oil* case, and it was formally restated in the *Trenton Potteries*[18] case in 1927, when the Court held that a price fixing agreement was inherently an unreasonable restraint, and constituted a *per se* violation of law. In 1940, this same doctrine, which had then continued for forty-one years, was again reaffirmed in the *Socony-Vacuum* case.

The prohibition against horizontal price fixing—that is, agreement on prices among persons competing with each other—was also at one time deemed to exist in the case of vertical price fixing agreements and contracts. In the *Dr. Miles Medical*[19] case, it was held that an agreement between a manufacturer and the distributors of his products fixing resale prices was an unreasonable restraint, as price competition among the distributors would be destroyed thereby. The Court could see no difference between this type of price fixing agreement and any other. Nor can I.

However, the decisions outlawing resale price maintenance agreements resulted in the enactment by the Congress of the Miller-Tydings Amendment to the Sherman Act in 1937 and the McGuire Act in 1951, under which resale price maintenance agreements, when authorized by State law, shall not be deemed to violate the federal antitrust laws. Thus there has been carved out, by statute,

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[18] *United States v. Trenton Potteries*, 273 U. S. 392 (1927).
[19] *Dr. Miles Medical Co. v. J. D. Park & Sons*, 220 U. S. 373 (1911).

an exception to the principle that agreements to eliminate price competition are inherently unreasonable and unlawful.

In addition to price fixing, other types of conspiracies to restrain trade have been held by the courts to be inherently unreasonable. These include coercive boycotting[20] and agreements to divide or allocate markets.[21]

The decision in the *Apex Hosiery* case[22] contains a comprehensive review and analysis of the history of decisions interpreting section 1 of the Sherman Act. It was there pointed out that it was not the purpose of the Act to police or regulate the interstate transportation or movement of goods and property, but was to prevent restraints to free competition in business and commercial transactions which "tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services." The Court stated that the common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law.

> "They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market."

In the *Fashion Originators' Guild*[23] case, the Supreme Court reiterated the statement that a conspiracy having as its necessary tendency or as its purpose and effect the direct suppression of competition was within the condemnation of the Sherman Act.

These cases provide a number of specific criteria for determining what is a conspiracy in "unreasonable" restraint of trade.

In the discredited *Knight* decision of 1895, the Court appeared to believe that the words "trade and commerce" should apply only to actual interstate shipment of tangible goods. Subsequent decisions have left no doubt that the term "trade and commerce" applies to personal services and to intangibles, as well as to tangible products.

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[20] *Fashion Originators' Guild v. Fed. Trade Comm.*, 312 U. S. 457 (1941).
[21] *United States v. National Lead Co.*, 332 U. S. 319 (1947); *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951).
[22] See note 15, *supra*.
[23] See note 20, *supra*.

(Continued on page 280)

Junior Barrister Legal Essay Contest and September Issue of the Bar Bulletin

The Junior Barristers of the Los Angeles Bar Association will write and edit the September issue of the LOS ANGELES BAR BULLETIN. Preceding the publication of the issue, the Junior Barristers will hold their Seventh Annual Legal Essay Contest. The winning entry and the entries receiving honorable mention will be published in the September issue of the BAR BULLETIN. Other outstanding articles will be published in subsequent issues.

The writer of the winning article in the essay contest will receive the Judge Ashburn award of $100.00. Suitable trophies will be awarded the writers of the articles receiving honorable mention.

The articles submitted in the past have included interesting points of law researched and used in briefs which have been expanded by the brief writer for use in the contest. Other entries have advanced suggested changes in the law advocated by the writer. Perhaps you have the legal analysis and research completed for a similar article. The Legal Essay Contest affords an excellent opportunity for the use of such material. Your articles are invited. In most instances they will be made available to the members of the bar by publication. Enter the contest now and submit an entry. Contest rules are as follows:

Eligibility: All attorneys, whether members of the Junior Barristers or not, who had not reached their thirty-sixth birthday on or before December 31, 1954;

Subject: Any legal topic of interest or benefit to the bar;

Length: Approximately ten (10) legal size, double spaced, typed pages;

Copies: Four legible copies should be submitted.

Deadline: All entries should be submitted to the Junior Barrister Editorial Board at the office of the Los Angeles Bar Association, 815 Security Building, Los Angeles 13, California, no later than 5:00 P.M. on Friday, July 1, 1955.

The judges for the contest this year will be the Honorable James M. Carter, District Judge of the United States District Court, the Honorable Minor Moore, Presiding Justice of Division Two, Second Appellate District, District Court of Appeal, and the Honorable Julius V. Patrosso, Judge of the Superior Court.

The members of the Junior Barrister Committee in charge of the Legal Essay Contest and the September issue of the BAR BULLETIN invite your inquiries. They are: John L. Cole, Chairman, George Benedict, Jr., George M. Henzie, Robert Schlesinger, George Treister, Stewart Walser, Glen Warner and Roger Williams.

THE NEW SHERMAN ANTITRUST LAW IN REVIEW

(Continued from page 278)

In the *Baseball*[24] decision the Supreme Court stated:

". . . Personal effort, not related to production, is not a subject of commerce."

Ten years after that statement was made, in the *Atlantic Cleaners & Dyers*[25] case, the Supreme Court interpreted the word "trade" as used in section 3 of the Sherman Act as meaning more than traffic in buying, selling, or exchanging of *commodities* in commerce, and that it should be interpreted in a broader sense, as equivalent to occupation, employment or business, whether manual or mercantile. The Court held that business of cleaning, dyeing, and otherwise renovating clothes constituted "trade or commerce." Thus, without reference to the *Baseball* decision, the Supreme Court decided that the words "trade and commerce" meant something more than "personal effort . . . related to production."

Ten years later in the *American Medical Association*[26] case, the Supreme Court held that a corporation organized to provide medical care and hospitalization to its members was engaged in "business" or "trade" within the meaning of the words "trade or commerce" as used in section 3 of the Sherman Act.

In 1944, in the *Southeastern Underwriters*[27] case, the Court held that the fire insurance business was trade or commerce within the meaning of section 1 of the Sherman Act. The Court defined commerce as including "businesses in which persons bought and sold, bargained and contracted." It thus appears that the words "trade and commerce" are not restricted to the production or dealing in commodities, but also include businesses based upon transactions involving personal services and the payment of money.

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[24]See note 12, *supra*.
[25]*Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427 (1932).
[26]*American Medical Assn. v. United States*, 317 U. S. 519 (1943).
[27]*United States v. Southern Underwriters Assn.*, 322 U. S. 533 (1944).

(To be Concluded in July issue.)

Silver Memories

A. Stevens Halsted, Jr.

William Green Hale, Dean and professor of law at Washington University, St. Louis, will succeed Dr. **Justin Miller** as Dean of the U.S.C. School of Law. Dean Miller recently resigned to accept the deanship of Duke University Law School.

* * *

A foul blow by **Jack Sharkey** of Lithuania gave his opponent **Max Schmeling** of Germany the heavyweight boxing championship in the fourth round at Yankee Stadium.

* * *

With the withdrawal of the last French soldiers of the army of occupation at the Kehl bridge head on the Rhine to Strasbourg, the evacuation of the Rhineland has been completed.

* * *

Major Sir **Henry O. D. Segrave,** holder of the world's auto speed record, was killed on Lake Windermere, England, when his motorboat, Miss England II, just after running a measured mile at 101 miles an hour, dived and disintegrated.

* * *

The University of Michigan Law School has become the wealthiest school of its kind as a result of gifts totaling $21,000,000 from **William Wilson Cook,** graduate of the class of '82.

* * *

Bigger than any plebiscite result ever before attained by the L. A. Bar Association, the vote of the membership on the 39 candidates for the 11 judgeships to be balloted on in the August primaries exceeded *77%* of the ballots mailed out.

Title Guarantee and Trust Company has acquired the northwest corner of Fifth and Hill Streets for the erection of a limit height structure. Demolition of the California Club Building on the site will commence shortly.

* * *

To commemorate the anniversary of his flight from Albany to New York in 1910, **Glenn H. Curtiss** flew a modern 18-passenger transport plane with a full load of passengers over the same route —time 80 minutes as compared with 152 minutes twenty years before.

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Solemnizing a wedding in "high-life," Municipal Judge **Walter Guerin** has just figured in a marriage ceremony that is declared to be the first of its kind in history. The "I do, I do" was said 3,000 feet above the City Hall Tower in the Goodyear blimp "Volunteer." The wedding fee was not mentioned but is said to have been extremely high.

* * *

After 120 years as a hotel, the Quincy House in Boston has closed its doors. It was built in a day when money was so scarce that the lease provided that rent should be paid in pounds of pig iron, grains of gold or bushels of corn.

* * *

By a vote of 41 to 39, the Senate rejected the nomination of U. S. Circuit Judge **John J. Parker** of North Carolina to fill the vacancy on the Supreme Court resulting from the recent death of Mr. Justice **Sanford**. It was the most dramatic battle against a nominee for the highest court since two of President **Cleveland's** appointees were turned down 36 years ago. **Owen J. Roberts**, a Philadelphia lawyer, was subsequently nominated by President **Hoover** and confirmed unanimously by the Senate.

* * *

At Florence, Premier **Mussolini**, cheered by 100,000 Fascist Militiamen, shouted that he intended to build ship for ship, ton for ton, as many warships as France builds. He ended by declaring that right is a vain word without might, that phrases are fine but muskets, machine guns, ships and fighting airplanes are even better.

(Continued on page 288)

Los Angeles County Law Library
Recent Acquisitions

Adamiyat, F. Bahrein Islands, a legal and diplomatic study. 1955, 268 p.

Allen, C. K. Law and disorders, legal indiscretions. 1954, 162 p.

Aycock, W. B. Military law under the uniform code of military justice. 1955, 430 p.

Bates, C. Ohio civil practice, pleading, procedure, forms, 5th ed. 1955, v.1

Beaney, W. M. The right to counsel in American courts. 1955, 268 p.

Benton, W. E., ed. Nuremberg, German views of the war trials. 1955, 232 p.

Boschert, A. M. Leases of agricultural lands and other property in Missouri. 1954, 258 p.

Bridges, Y. The tragedy and Road-Hill House. 1955, 272 p.

Cairms, M. B. The law of torts in local government. (English) 1954, 142 p.

Caldwell, L. K. The government and administration of New York. 1954, 506 p.

Clerk, J. F. Torts, 11th ed. (English) 1954, 1097 p.

Couper, W. J. Pension planning, experience and trends. 1954, 245 p.

Drion, H. Limitation of liabilities in international air law. 1954, 389 p.

Duff, C. A new handbook on hanging. 1955, 180 p.

Gowers, E. Plain words, their A.B.C. 1955, 298 p.

Grant, E. L. Depreciation, 1955, 504 p.

Institute on Federal Taxation, New York University. Proceedings, 13th. 1955, 1326 p.

Jackson, F. H. Simeon Eden Baldwin, lawyer, social scientist, statesman, 1955, 291 p.

Kellahin, G. J. Legally speaking. 1955, 85 p.

Knorst, W. J. Interstate commerce law and practice. 1954, v. 3.

Lasser Tax Institute. How to save estate and gift taxes. 1955, 310 p.

Lore, M. M. How to win a tax case. 1955, 244 p.

"To the man of means" is a digest, in simple language, of the full range of trust services available through Bank of America anywhere in California. We'd like you to have copies for your desk and reference library—or to present to important clients. Your nearest Bank of America branch will be happy to supply you.

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Martin, J. B. Break down the walls; American prisons, present, past and future. 1954, 310 p.

Michigan Administrative Code. 1954, 7226 p.

N.A.C.C.A. Trial and tort trends, the 1954 convention proceedings. 1955, 459 p.

Pritchard, R. Law of wills and administration of estates (Tennessee) 3d ed. 1955, v. 1.

Puerto Rico. Laws, statutes, etc. Laws of Puerto Rico Annotated. 1954, v.1-2.

Remington, H. Bankruptcy, 6th ed., forms, 1955, 868 p.

Remington, H. Bankruptcy, 6th ed., statutes, general orders and rules. 1955, 1040 p.

Rordam, K. Treaties on Baltcon-Charterparty. 1954, 196 p.

Rothenberg, S. Copyright and public performance of music. 1954, 188 p.

Sacramento News Letter. Members of the California legislature and other state officials. 1955, loose-leaf.

Samter, M. Regional allergy of the United States, Canada, Mexico and Cuba. 1954, 395 p.

Swindler, W. F. Problems of law in journalism. 1955, 551 p.

Trachsel, H. H. The government and administration of Wyoming. 1953, 381 p.

Tulane University School of Law. 4th annual tax institute proceedings. 1955, 561 p.

U.S. National Railroad Adjustment Board. Hewitt's index-digest of important decisions and principles by all four divisions of the Railroad Adjustment Board. 1954, loose-leaf.

Scanning the Committee Reports

The Committee on Criminal Law and Procedure reported in its annual report a significant public service in the development of the Criminal Defense Lawyer Reference Service. (See July-August, 1954, issue of State Bar Journal for discussion).

Under the procedure adopted by the Committee, the phone numbers of attorneys registered with the Reference Service are placed on a rotating card file operated by a telephone answering service. Persons incarcerated and who are without counsel, can call the answering service and obtain the services of one of the member attorneys.

The service began actual operation on September 10, 1954, and 463 calls went through the service up to December 31, 1954. As of February 10, 1955, there were 130 attorneys registered as members of the reference service. The present Committee efforts include improvement of the service by means of a questionnaire to all present Service members. Harry P. Amstutz served as chairman of this committee.

* * *

The Civil Service Committee's annual report indicates that the Committee assisted the Civil Service Commission with a wide range of examinations from Deputy District Attorney I up to Chief Area and Branch Offices. Ten examinations were conducted by 3-man teams made up of Committee members with a total number of 160 candidates being examined. This work load was the heaviest for any single year thus far. Eugene D. Williams served as chairman of this committee.

* * *

The report of the Committee on Taxation by its chairman, William Halpern, indicates that last year was a busy one for that Committee, during which their activities included:

1. Publishing articles in the Bulletin warning attorneys concerning the effects of the new Internal Revenue Code because of the retroactive application of many sections; on the tax consequences of payments under interlocutory divorce decrees; and a major article on the new tax code which filled the entire November issue as well as part of the December issue.

2. Studying and advocating changes in the I.R.C. section relating to sales of stock by the estate of a decedent for tax payment

when the stock is community property and the studying and revision of a proposed amendment to the California Inheritance Tax Act relating to liabilities and debts of the estate arising after the fixing of the inheritance tax, working in connection with the Probate Committee.

3. Studying the *Agran* case for the purpose of determining whether Committee or Association action was in order, concluding with the decision to take no action.

4. Settling an administrative problem with the Internal Revenue Service involving the conduct of a tax agent who refused to deal with the attorney of a taxpayer whose status in the case had been properly entered.

SILVER MEMORIES

(Continued from page 282)

A recent Literary Digest poll has shown that while drinking is prohibited by Constitutional amendment, lawyers are the wettest of the world's leading workers, wetter than doctors, educators or bankers.

* * *

President **Charles A. Beardsley** of the State Bar has appointed a committee representing a cross-section of the bar to recommend the imposition of some educational standards in qualifying for admission to practice. The members are **Hubert T. Morrow** of this city, Chairman; **Fred E. Borton** of Bakersfield, **Ezra W. Decoto** of Oakland, **H. A. Harris** of Sacramento, **Henry Heidelburg** of San Francisco, **Marion R. Kirkwood** of Stanford University; **Fred Lindley** of San Diego, **Robert L. McWilliams** of San Francisco and **Joseph Scott** of Los Angeles.

* * *

The all-Russian Medical Congress in Moscow decided henceforth in the Soviet Union to abolish Latin terminology or abbreviations in medical prescriptions as a "survival of the medieval ages." The Russian language will replace Latin in all branches of medicine.

* * *

Sir Thomas Lipton's yacht, Shamrock V, Cup defender, was launched at Gosport, England, while the yacht, Enterprise, one of the American defenders, was launched at Bristol, R. I.